91-578

Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER 1991 TERM

JOHNNY MACK WHITE,
Petitioner

v.

JAMES A. COLLINS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID H. BERG
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3704 Travis Street
Houston, Texas 77002
(713) 529-5622

COUNSEL OF RECORD FOR
PETITIONER JOHNNY
MACK WHITE

NO. _____

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MACK WHITE

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misapplied *United States v. Strickland*, in holding that Petitioner was not harmed by the ineffective assistance of his trial counsel.

PARTIES TO THE PROCEEDING BELOW

Petitioner Below: Johnny Mack White

Respondent Below: James A. Collins, Director of the Texas Department of Criminal Justice

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DECISIONS BELOW

The order denying Petitioner's Application for a Certificate of Probable cause to appeal by Justice Scalia is attached as Appendix "A".

The order of the Fifth Circuit Court of Appeals denying Petitioner's Application for Probable Cause is attached Appendix "B".

The memorandum and order of the District Court for the Southern District of Texas' denying a Certificate of Probable Cause is attached as Appendix "C".

The order of the District Court for the Southern District of Texas' denying Petitioner's Application for Writ of Habeas Corpus is attached as Appendix "D".

The Texas Court of Criminal Appeals' denial of Petitioner's Application for Writ of Habeas Corpus is attached as Appendix "E".

The Texas Court of Criminal Appeals Refusal of Petitioner's Petition for Discretionary Review is attached as Appendix "F".

The Opinion of the Texas Court of Appeals affirming Petitioner's conviction is attached as Appendix "G".

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on July 9, 1991. There have been no extensions of time within which to petition for a writ of certiorari, and this is not a cross-petition for a writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. § 1651 to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari. *House v. Mayo*, 324 U.S. 42, 44-45 (1945).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the U.S. Constitution, which are set out in their entirety in Appendix "H".

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Petitioner, Johnny Mack White, was convicted in Cause No. 382,199 in the 338th Judicial District Court of Harris County, Texas for solicitation of capital murder. On October 11, 1985, Mr. White was sentenced to life imprisonment and a $10,000 fine was imposed. Mr. White filed a timely appeal in the Texas Court of Appeals, First Supreme Judicial District, which court affirmed his conviction on June 4, 1987. Mr. White then filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals. Discretionary review was refused on November 18, 1987.

On June 13, 1988, Mr. White filed an Application for Writ of Habeas Corpus with the Texas District Court. Without hearing, the District Court sent the Petition to the Court of Criminal Appeals with a recommendation that it be denied. On November 30, 1988, the Court of Criminal Appeals denied the Application without a written opinion.

On December 8, 1988, Mr. White filed a Petition for Writ of Habeas Corpus with the Federal District Court in the Southern District of Texas, Houston Division, which was denied on June 7,

1990. On June 21, 1990, Mr. White filed a motion for the court to reconsider the decision and to conduct an evidentiary hearing. The motion was granted on August 29, 1990. The evidentiary hearing was held on November 13, 1990. On November 19, 1990, the District Court again denied Mr. White's Petition. On December 3, 1990, Mr. White filed a timely notice of appeal. On January 3, 1991, the District Court refused to grant a certificate of Probable Cause. On February 18, 1991, Mack White filed his Petition to the Fifth Circuit for a Certificate of Probable Cause. On July 9, 1991, the Fifth Circuit refused to grant such a Certificate. On August 5, 1991, Petitioner applied to the Supreme Court Justice for the Fifth Circuit for a certificate of Probable Cause. Justice Scalia denied the Application on August 8, 1991.

B. STATEMENT OF FACTS

In June of 1982, Petitioner, Johnny Mack White was arrested by Sergeant Hershel L. Erwin and charged with the offense of delivery and possession of cocaine. Sergeant Erwin had allegedly purchased cocaine from Mr. White while posing as a drug dealer named "Leo". Evidence of this extraneous offense was admitted at trial for the limited purpose of showing Mr. White's motive with respect to the alleged solicitation.

In May of 1983, R.L. Steinett, a long-time friend of Mr. White's family, visited Mr. White's residence. Steinett initiated a conversation concerning the pending cocaine charges against Mr. White. Unbeknownst to Mr. White, Steinett had been working as a paid informant for the Texas Department of Public Safety for some time. The record reflects that Steinett was well-versed in the practice of making cases against people for the DPS.

Steinett told Mr. White that the State was bringing a witness in from Florida to testify in White's cocaine case. Steinett suggested that White have the witness killed to escape prosecution, but Mr. White declined the offer. Despite Mr. White's lack of interest, Steinett contacted Sergeant Tommy Arp, an officer with the Narcotics Division of the Department of Public Safety, informing Arp that he knew of someone who wanted to have an agent killed. Officer Kenneth Dracoulis was assigned to further investigate the case. Steinett was then instructed to set up a meeting between the officers and Mr. White.

Dracoulis and several other officers came to Houston, posing as drug dealers and hit men. On June 7, 1983, Dracoulis met with Mr. White and Robert Bradshaw in the coffee shop of a hotel. Bradshaw was a friend of Mr. White's who had been working at his

garage for about three months.

At the June 7th meeting, a drug deal involving the exchange of marijuana for cocaine was allegedly discussed. Bradshaw, on instruction from Steinett, had obtained four thousand dollars from J.R. White, Petitioner's father. The money was allegedly to be used as a down payment for having the drug agent killed. Bradshaw had received instructions from Steinett not to disclose the details of the transaction to Petitioner Johnny Mack White. Steinett testified that the killing was to be done on behalf of J.R. White, not Petitioner. Petitioner left the table at the coffee shop, and during his absence, Bradshaw gave Dracoulis the four thousand dollars. Some time after Mr. White returned to the table, Dracoulis and Bradshaw left the coffee shop and went to one of the rooms of the hotel. While in the hotel room, Bradshaw allegedly gave Dracoulis a description of the individual who was to be killed, and it was decided that Bradshaw should obtain a better description and return to the hotel room. Subsequently, Steinett and Bradshaw returned to the hotel room, and Bradshaw gave Dracoulis a description, the name "Leo", and a drivers licence number. Later that evening, Bradshaw called Dracoulis and cancelled the murder deal. The following morning, June 8, 1983, Dracoulis arrested

Petitioner, his father J.R. White, and Bradshaw for solicitation of capital murder.

ARGUMENT AND REASONS FOR GRANTING WRIT

Petitioner's Sixth Amendment rights were violated by the totally ineffective performance of his trial counsel. Ineffective assistance of counsel is judged by the standards noted in *Strickland v. Washington*, 466 U.S. 667 (1984): that counsel did not render reasonably effective assistance as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and that the failure to render such assistance prejudiced the defendant. The examples reiterated below, taken as a whole, reveal that White did not receive assistance of counsel as is guaranteed by the Sixth Amendment, and that lack of competent assistance so prejudiced him that the very outcome of his trial was affected.

1. Extraneous Acts

Several times during the trial, Petitioner's counsel allowed evidence of extraneous acts to be admitted into evidence without objection. For example, during the testimony of Hershel Erwin, the officer who was the target of the murder solicitation, Counsel did not object to Erwin's detailed description of the price and purity of cocaine and his discussions with White concerning same. This

testimony was extremely prejudicial in that it tended to imply that Petitioner is a knowledgeable and longstanding drug dealer, familiar with the prices and purity of cocaine. Later in Officer Erwin's testimony, Counsel failed to object to Erwin's statements concerning his feeling that he was being watched by associates of the Petitioner. The statements were prejudicial in that they imply Petitioner was involved with a gang or in a conspiracy that was large enough that Officer Erwin could be kept under constant surveillance. Twice more during this testimony Officer Erwin implied that Petitioner was involved in a gang or a conspiracy, and Counsel failed to object to either instance. Then, apparently feeling that not enough irrelevant, prejudicial testimony had been elicited from Officer Erwin, Counsel asked him how many times he had engaged in drug transactions with Petitioner, and asked several questions concerning the trading of guns for drugs. This testimony not only reinforced the implication that Petitioner was a longstanding drug dealer, but raised the possibility that he was involved in illegal firearms trading as well. Counsel's action also opened the door for additional questions concerning other drug transactions during the Prosecutor's re-direct examination, emphasizing yet again Petitioner's long history as an alleged drug dealer.

White's trial counsel filed a motion in limine prior to trial to keep out evidence concerning extraneous offenses. That motion was denied; however, a denial of the motion does not mean that trial counsel should have allowed all evidence concerning extraneous offenses to be presented without objection.

While the fact that White had been charged with delivery of a controlled substance and the fact that Officer Erwin was the main witness against him for that charge may have been admissible to prove White's alleged motive to have Officer Erwin killed, the extraneous acts and conversations noted were not relevant to that motive, and any probative value they may have had was substantially outweighed by unfair prejudice to White. Even if evidence is admissible as an exception to the rule against introducing prior bad acts, if the probative value of that evidence is outweighed by the prejudice it causes to the defendant, such evidence should not be admitted. *See United States v. Schwartz*, 790 F.2d 1059 (3rd Cir. 1986). In *Schwartz*, evidence consisting of generalized testimony suggesting that the defendant was a longstanding drug dealer was found to be prejudicial not only because it implied that he must be guilty of the crime charged because he was guilty of prior crimes, but because the general nature of the testimony precluded any

meaningful refutation by the defendant. *Id.* at 1062; *See also, United States v. Hernandez*, 750 F.2d 1256 (5th Cir. 1985). In White's case, the testimony tending to suggest that he was a longstanding drug dealer, possibly an illegal firearms dealer, and was involved with a gang or in some sort of conspiracy was just the sort of generalized, and almost impossible to refute, testimony that was found to be prejudicial error in *Schwartz*. Therefore, even though the court had denied trial counsel's motion in limine to keep out extraneous acts, counsel's failure to meet the minimum professional standard, not only by neglecting to object to, but by actually instigating testimony concerning irrelevant and extremely inflammatory extraneous acts, is clearly an example of ineffective assistance.

2. Inadequate Investigation

Petitioner's trial counsel was also ineffective in that he failed to conduct an adequate investigation of the case prior to trial. It is clear that counsel had not conducted a thorough investigation prior to trial. Why else would counsel have asked some of the questions he did in cross-examination, or why else would he have failed to make timely objections to some of the prejudicial testimony, unless he was so unfamiliar with the facts of the case as

not to know the areas that were of possible prejudice to his client? For example, Counsel failed to object when the Prosecutor began to ask questions of officer Erwin concerning the details of his arrest of Petitioner. If Counsel had conducted an adequate investigation, he would have know that questions in this area could illicit prejudicial information concerning Petitioner's "associates" and the drug paraphernalia found at his residence. During the testimony of Officer Dracoulis, counsel failed to ask for a jury instruction concerning the officer's opinion that petitioner knew that the final negotiations for the killing had taken place. Had counsel conducted an adequate investigation, he would have known that the issue of Petitioner's knowledge of those negotiations was pivotal to his case and would have asked for a jury instruction, if not for a mistrial. Finally and most telling, counsel exhibited his lack of investigation during this cross-examination of Officer Erwin when he asked questions concerning other drug transactions and the trading of guns for drugs. Had counsel adequately investigated the case, he surely would never have asked these questions of Officer Erwin.

3. Failure to Present all Available Evidence

Petitioner's trial counsel failed to present all available evidence. There was some evidence at trial that White was not even present when the final negotiations and the exchange of money concerning the killing of Officer Erwin were conducted. Rather then develop this testimony, and perhaps put on his own evidence concerning this issue, counsel allowed the witness to express his opinion that White knew about the negotiations without asking for an instruction for the jury to disregard, and without following up by emphasizing that White was not present.

4. Improper Cross-Examination

Petitioner's counsel conducted an improper cross-examination of Officer Erwin in that he elicited general details of extraneous acts which were clearly prejudicial to White. The cross-examination testimony concerned general details which tended to indicate that White was a drug dealer of long-standing and may have been dealing in illegal weapons. In addition, it was so general as to be almost impossible to refute; therefore, it was clearly prejudicial. See *Schwartz, supra*.

5. Failure to Request Jury Instructions

On two occasions during Officer Dracoulis' testimony, Petitioner's counsel failed to request a jury instruction when his objections were sustained. First, when the witness referred to a hearsay conversation concerning the killing, and second, when the witness stated that White's statements and behavior indicated to him that White knew that the negotiations concerning the killing had just been completed. The statement "...Johnny Mack White arrived back at the table and instructed us whatever we were talking about was between us, that he didn't want to know, which indicated to me that he knew [about the negotiations for the killing]," was clearly prejudicial to White. Without the instruction to disregard, the jury could, and probably did consider the statements when deliberating. Whether or not White knew about the proposed killing was of paramount importance to the case, and was in controversy because Dracoulis stated that he felt that White knew, while Bradshaw, another government witness, stated that he did not. The fact that Dracoulis was a DPS Narcotics Officer, and was trained to gauge the reactions of suspects was not lost on the jury, and they most certainly gave great weight to his testimony. Therefore, allowing the testimony to go to the jury without an instruction to disregard

was prejudicial to White.

6. Improper Strike for Cause

Petitioner's trial counsel improperly struck a juror for cause. It is not clear from the transcript that the juror was biased. While she stated that she felt she would be "fairer" to the Defendant, she also agreed that she would hold the prosecution to its burden of proof beyond a reasonable doubt. Second, counsel made no attempt to clear up what was obviously a confusing concept for the juror, not did he attempt to rehabilitate her, which was clearly error.

7. Failure to Exclude Hearsay

Petitioner's trial counsel failed to object to the testimony of Erwin concerning his prior conversations with White. Although the testimony may have been an admission of a party-opponent, it was inadmissible because it tended to imply that White was a long-time drug dealer, and was too general for White to be able to effectively refute it. *Schwartz, supra.* Therefore, counsel's failure to object was prejudicial error.

In denying a Certificate of Probable Cause to Petitioner, the Fifth Circuit held that Petitioner had not shown that the ineffective assistance of his trial counsel prejudiced his defense. In *Strickland*

v. Washington, this Court held that the test for prejudice is whether, absent the errors, the factfinder would have had reasonable doubt concerning guilt. 466 U.S. at 695. The evidence against Petitioner in this case was not strong, it consisted of testimony by Dracoulis that Petitioner was aware of the murder plans and controverted evidence that Petitioner provided information as to the identity of the intended murder victim. Trial counsel's ineffectiveness in allowing irrelevant detailed testimony concerning Petitioner's alleged drug dealing and testimony concerning the police officer's personal opinions as to what Petitioner did and did not know, along with the other errors, more likely than not affected the jury's finding of guilt.

Because the actions of counsel, reiterated briefly above, clearly indicate that Petitioner did not receive a level of assistance from counsel that was effective within the meaning of the Sixth Amendment, and because that ineffectiveness almost certainly affected the result of his trial, The conviction against him should be reversed.

CONCLUSION AND PRAYER

Petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit and that said judgment be reversed, and the conviction against Petitioner dismissed.

Respectfully Submitted,

BERG & ANDROPHY
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(713) 529-5622
Attorney for Petitioner,
Johnny Mack White

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

August 9, 1991

Mr. David H. Berg
3704 Travis
Houston, TX 77002-9506

Re: Johnny Mack White, v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division
Application No. A-115

Dear Mr. Berg:

The application for a certificate of probable cause to appeal to the United States Court of Appeals for the Fifth Circuit in the above-entitled case has been presented to Justice Scalia who on August 9, 1991, endorsed thereon the following:

"Denied 8/9/91 AS."

Very truly yours,
WILLIAM K. SUTER, Clerk
By
/s/ Christopher W. Wasil
Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-6035
USDC No. CA-H-88-4299

JOHNNY MACK WHITE,
Petitioner-Appellant

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,
Respondent-Appellee

Appeal from the United States District
Court for the Southern District of Texas

(July 9, 1991)

An appeal by a state habeas corpus petitioner may not proceed unless a district or circuit judge issues a certificate of probable cause (CPC). Fed. R. App. P. 22(b). This Court issues a CPC when the petitioner makes a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). White has not made such a showing. Therefore, IT IS ORDERED that his motion for a CPC is DENIED.

White argues that the indictment charging him with solicitation to commit capital murder was fatally defective. Upon habeas review, this Court will uphold a state indictment as sufficient unless the petitioner can show that the indictment is so defective that the convicting court had no jurisdiction. *Morlett v. Lynaugh*, 851 F.2d 1521, 1523 (5th Cir. 1988), *cert. denied*, 489 U.S. 1086 (1989). The sufficiency of the indictment is determined under state law. *Id.* If the sufficiency of the indictment was presented to the state's highest court of appeal and found sufficient, then this question is foreclosed in a federal habeas corpus proceedings. *Id.*

The state trial court held that the indictment was legally sufficient to support the conviction. The Texas Court of Criminal Appeals denied relief without written order, thus implicitly rejecting the contention that the indictment was fundamentally defective. *See id.*; *Alexander v. McCotter*, 775 F.2d 595, 599 (5th Cir. 1985). Thus, White is foreclosed from proceeding on this ground in a federal forum.

White argues that the evidence was insufficient to support his conviction because there was no direct evidence that White intended the killing to occur. Under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560

(1979), a rational trier of fact would have found beyond a reasonable doubt that White, who was under pending indictments for drug charges, solicited an undercover agent to commit the murder of Hershel Erwin, an officer with the Texas Department of Safety and the sole witness against White. White supplied others with Erwin's undercover name, a driver's license number taken from Erwin, and Erwin's physical description with the understanding that he was supplying information necessary to identify the prospective murder victim. This issue is meritless.

White argues that his counsel rendered ineffective assistance and cites specific instances. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) mandates that a habeas petitioner must show the deficiency of his counsel's performance and that the deficient performance prejudiced his defense in order to establish a claim of ineffective assistance of counsel. *Id.* at 687. Both prongs of the *Strickland* test must be proved to warrant relief. *Bates v. Blackburn*, 805 F.2d 569, 577 (5th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987). In determining the merits of White's claims, this Court "must be highly deferential" to counsel's conduct. *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

a) White argues trial counsel was ineffective in failing to object to the introduction of evidence of extraneous offenses of prior drug transactions. The trial court deemed all this evidence admissible when it ruled on trial counsel's motion in limine. Counsel was not required to engage in the filing of futile motions, or in making futile objections, *see Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984), and so did not render deficient representation in failing to object to the evidence when it was presented at trial.

b) White argues that trial counsel was ineffective in improperly cross-examining witnesses. As noted in a), *supra*, evidence of White's prior drug transactions was ruled admissible by the trial court. This questioning also supported defense counsel's trial strategy that, while White was a drug dealer, he did not solicit others in commit murder. Additionally, information about the prior offenses showed that White knew Erwin's real name. This information enabled defense counsel to argue in closing that it was illogical for White to have given others Erwin's undercover name, as the state argued, when he in fact knew Erwin's real name. This argument was used to support the defense theory that White did not

know about the murder for hire. This Court will not second-guess trial counsel's strategy decisions. *Strickland*, 466 U.S. at 689.

c) White contends that counsel failed to investigate the case, but does not show what the investigation would have revealed and how it would have altered the outcome of the trial. This argument fails due to this omission. *See U.S. v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Even if White's argument that an informed counsel would not have done certain actions was correct, White still fails to show how any of trial counsel's actions effected the outcome of the trial. Since White fails to prove the prejudice prong of *Strickland*, he cannot succeed on his claim of ineffective assistance on this ground.

d) White argues that trial counsel failed to expand on the defense theory that White did not know of the murder for hire scheme and should have presented his own witness to testify as to this point. Other than a state agent, White himself was the only person present at a meeting where the murder for hire scheme was discussed who did not testify. This was obviously a considered decision by trial counsel which this Court will not second-guess. *Strickland*, 466 U.S. at 689. Habeas counsel does not volunteer who else should have testified on this point or what information

could have been discovered to expand on the defense theory. White's claim fails due to these omissions. *Green*, 882 F.2d at 1003.

e) White argues that trial counsel was ineffective in failing to request curative jury instructions to disregard certain testimony from two state witnesses. The record shows that the testimony was cumulative. White cannot show how this alleged error effected the judgment. He fails to show the necessary prejudice to succeed on the claim. *Strickland*, 466 U.S. at 691.

f) White argues that trial counsel was ineffective in striking a prospective jury for cause. This juror stated that she would hold the state to a higher burden of proof and would be fairer to the defendant. Trial counsel acted pursuant to Tex. Crim. Proc. Code Ann. § 3516(a)(9) (Vernon 1989) in requesting that this biased prospective juror be stricken for cause.

g) White argues that trial counsel was ineffective in failing to exclude hearsay evidence. The evidence White contests was ruled admissible in a pretrial hearing. *Strickland* does not require that counsel file futile motions or make futile objections. *Murray*, 736 F.2d at 283. This issue has no merit.

/s/ Carolyn D. King
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-88-4299

JOHNNY MACK WHITE,
Petitioner,

v.

JAMES A. COLLINS,
Respondent

MEMORANDUM ON APPEAL OF AN
APPLICATION FOR HABEAS CORPUS

Recently, the court denied White's application for a writ of habeas corpus. The petitioner filed a notice of appeal, and now he moves for a certificate of probable cause 28 U.S.C. § 2253 and Rule 22(b).

Probable Cause.

An appeal from a judgment denying habeas relief may not proceed unless a judge issues a certificate of probable cause for appeal. Fed. R. App. P. 22(b).

A review of the record convinces this court that the petitioner's proposed appeal does not present substantial constitutional issues nor show substantially that the petitioner was

deprived of a federal right. *See Taylor v. Maggio*, 727 F.2d 341 (5th Cir. 1984).

Conclusion.

Because the petitioner's complaints about the state criminal process do not present any arguable factual or legal basis which would support a claim for relief, a certificate of probable cause will be denied.

Signed on January 3rd, 1991, at Houston, Texas.

/s/ Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-88-4299

JOHNNY MACK WHITE,
Petitioner,

v.

JAMES A. COLLINS,
Respondent

ORDER

The motion of Johnny Mack White for a certificate of probable cause is denied.

Signed on January 3rd, 1991, at Houston, Texas.

/s/ Lynn N. Hughes
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-88-4299

JOHNNY MACK WHITE,
Petitioner,

v.

JAMES A. COLLINS,
Respondent

ORDER

Johnny Mack White's application of December 13, 1988, for a writ of habeas corpus is denied.

Signed on November 14, 1990, at Houston, Texas.

/s/ Lynn N. Hughes
United States District Judge

APPENDIX E

COURT OF CRIMINAL APPEALS

RE: No. 773-87

JOHNNY MACK WHITE

November 18, 1987

This is to advise that the Court has denied without written order the petition for discretionary review.

/s/ Thomas Lowe, Clerk

APPENDIX F

COURT OF CRIMINAL APPEALS

RE: Writ No. 18,851-01
Trial Court No. 382199-A

JOHNNY MACK WHITE

November 30, 1988

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

/s/ Thomas Lowe, Clerk

APPENDIX G

IN THE TEXAS COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

JOHNNY MACK WHITE,
Appellant

V.

THE STATE OF TEXAS,
Appellee

No. 01-85-00870-CR

On Appeal from the 338th District Court
of Harris County, Texas
Trial Court No. 382,199

OPINION

Appellant was found guilty of solicitation to commit the capital murder of Hershal Lee Erwin, an agent of the Department of Public Safety. The court assessed punishment at confinement for life and a $10,000 fine. At the time of the solicitation, appellant was under indictment for delivery of cocaine to Erwin, who had been posing undercover at the time as "Leo," a purported dealer in illicit drugs.

The record shows that R.L. Steinett, a friend of appellant's father for 22 years, stopped by appellant's house for a social call. During the stop, Steinett had the opportunity to speak to appellant regarding his pending narcotics trial. Allegedly, appellant asked

Steinett to find Mexican nationals to kill "Leo" and to obtain marijuana that appellant could exchange for cocaine. Steinett subsequently informed the authorities that appellant was seeking to kill "Leo," and the police decided to pose as Mexican marijuana dealers and hired killers in an effort to obtain evidence against appellant.

Steinett set up a meeting attended by the police officers, appellant, and appellant's friend and co-indictee, Robert Bradshaw. At the meeting, appellant participated in discussions regarding the drug swap. At some point, appellant absented himself from the table and went to the lobby. Bradshaw then gave Steinett $4,000 allegedly as a down payment for either the killing or for both the killing and the drug deal. Appellant returned to the table and told one of the officers that he did not want to know what had been done while he was gone.

Bradshaw, called by the State, was the only witness at trial who cast doubt on appellant's participation in the murder solicitation. Bradshaw testified that Steinett discussed the killing with the appellant and the appellant was against the killing, but Steinett told appellant that he, Steinett, owed appellant's father a favor. Bradshaw further testified that Steinett told him to collect the

$4,000 from appellant's father. However, Bradshaw testified that appellant provided a description of "Leo," that appellant supplied "Leo's" driver's license number, and that appellant was present when the killing was discussed after the meeting with the undercover police officers. Steinett, who had testified as a paid informant for the police on other occasions, testified that appellant approached him and inquired about the possibility of obtaining hired killers. He further testified that appellant had told him that the only person who could testify against him at his narcotics trial was "Leo," the officer who had made the arrest. Steinett further testified to discussions he had had with appellant's father regarding his providing an alibi for appellant.

Appellant alleges in his first point of error that the evidence is insufficient to convict him because evidence of entrapment was established at trial and not disproved by the State beyond a reasonable doubt. Texas law recognizes the "objective" test for entrapment, *Bush v. State*, 611 S.W.2d 428, 429 (Tex. Crim. App. 1981), under which inducement must be established by focusing upon the conduct of the officer or the agent and his conduct, and not upon the "predisposition" of the defendant. Once inducement is established, the trial court need consider only whether the methods

of persuasion used were likely to induce persons, not otherwise ready and willing to commit the crime, to engage in criminal conduct. *Id.* at 430. Appellant must present sufficient evidence to raise an issue of entrapment and, once raised, it is thereafter the State's burden to prove beyond a reasonable doubt that appellant was not entrapped. *Id.* Appellant did not, through his own witnesses, raise the issue of entrapment at trial, but claims that the acts of Steinett amount functionally to an inducement to commit a crime. Appellant asserts that Steinett's exploitation of friendship is an indication of overzealousness and improper conduct because Steinett was a long-standing friend who had initiated conversations regarding the cocaine case and suggested to appellant that execution of the officer was a way out. The State claims that there is no evidence of inducement because Steinett's directions to Bradshaw cannot be claimed by appellant as <u>his</u> inducement. *See Norman v. State*, 588 S.W.2d 340, 345, 346 (Tex. Crim. App. 1979). The only evidence regarding Steinett's inducement of appellant came from Bradshaw, who testified that Steinett had discussed the murder for hire with appellant, appellant's father, and Bradshaw. Bradshaw testified to a conversation between Steinett and appellant wherein Steinett had originated the idea of murder for hire. However, that conversation

took place after both transactions -- the cocaine-marihuana exchange and preparations for the slaying -- were well under way.

Appellant has failed to set forth sufficient facts to show that he, personally, was induced by Steinett, or to raise an issue regarding entrapment, and his first point of error is overruled.

In his second point of error, appellant claims that the evidence is insufficient to convict him because the State failed to corroborate accomplice witness testimony, as required by Tex. Code Crim. P. Ann. art. 38.14 (Vernon 1979). We are required to review the evidence in the light most favorable to the jury's verdict. To prove its case, the State must corroborate testimony of accomplice witnesses by evidence affirmatively tending to connect the accused with the offense. *Caraway v. State*, 550 S.W.2d 699, 702 (Tex. Crim. App. 1977); *Edwards v. State*, 427 S.W.2d 629, 632 (Tex. Crim. App. 1968). If corroborating evidence makes the accomplice's testimony "more likely true than not," it is sufficient. *Warren v. State*, 514 S.W.2d 458, 463 (Tex. Crim. App. 1974).

Appellant asserts that this Court may not consider the testimony of either Bradshaw or Steinett as sufficient without corroboration because they are accomplice witnesses. It is undisputed that Bradshaw was under indictment for the same offense

and that he is, therefore, an accomplice witness as a matter of law. *See Hendricks v. State*, 508 S.W.2d 633, 634 (Tex. Crim. App. 1974); *Creek v. State*, 533 S.W.2d 794, 795 (Tex. Crim. App. 1976). The parties dispute whether Steinett was an accomplice witness, appellant claiming that Steinett induced the illegal conduct, *see Parr v. State*, 606 S.W.2d 928, 929 (Tex. Crim. App. 1980), and is an accomplice witness as a matter of law because he brought about the entrapment. *See Ivy v. State*, 277 S.W.2d 712, 716 (Tex. Crim. App. 1955). The State claims that Steinett was not an accomplice because there is no evidence that Steinett aided appellant with culpable *mens rea*. Appellant failed to show that Steinett induced or brought about appellant's illegal conduct because Bradshaw's testimony, which cast doubt on Steinett, concerned a conversation that occurred after the transactions were well underway. Accordingly, Steinett was not an accomplice witness but merely an undercover agent for the State. *See Parr v. State*, 606 S.W.2d at 929. Steinett's testimony tended to corroborate Bradshaw's testimony in that he described the events in detail and appellant's connection to them.

The State is required to prove that appellant made the solicitation and intended to act upon it. The State proved that

appellant willingly provided both a description and a driver's license of Erwin, after appellant was present during conversations in which Erwin's slaying was discussed, to facilitate Erwin's identification. We conclude that the evidence is sufficient because it proves that appellant made the solicitation with the requisite intent to act upon it. *See Warren*, 514 S.W.2d at 463. Appellant's second point of error is overruled.

Appellant claims in points of error three through seven that he was denied effective assistance of counsel due to his attorney's failure to request jury instructions or charges, or to object to evidence allegedly introduced in violation of this right to counsel. The Sixth Amendment test for whether counsel is reasonably effective is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. at 687.

Appellant claims that he was denied effective assistance of counsel because his attorney filed to request jury instructions on the defense of entrapment, alleging that his counsel is required to present all evidence and argument to support any defense he may have. *See Ex parte Duffy*, 607, S.W.2d 507, 518 (Tex.Crim.App. 1980). Appellant insists that his counsel's failure to present a jury charge shows that his counsel was deficient and that such deficiency was serious enough to undermine confidence in his trial result. *See Ex parte Duffy*, 607 S.W.2d at 521. We have concluded, however, that the evidence does not raise the issue of entrapment. That State also claims that appellant's trial counsel did not request a jury charge on entrapment because appellant's counsel did not intend to present an argument on entrapment, reasoning that such an argument may have weakened appellant's position at trial. We agree.

Next, Appellant claims that he was denied effective assistance of counsel because his attorney failed to request a jury instruction that Bradshaw was an accomplice witness as a matter of law. Texas cases clearly recognize a co-indictee as an accomplice witness as a matter of law. *Hendricks*, 508 S.W.2d at 634. Therefore, Bradshaw was an accomplice witness beyond dispute and it was the trial court's duty to so instruct the jury. *See Arney v. State*, 580

S.W.2d 836, 839 (Tex.Crim.App. 1979). The trial judge submitted Bradshaw's status as an accomplice witness as a question of fact. Appellant's counsel did not object, and thereby failed to preserve error. However, to meet the second prong of the *Strickland* test, appellant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. at 694. Appellant has failed to meet this test because the record shows that Bradshaw's testimony cast doubt upon Steinett's incriminating testimony, and a jury charge that would have weakened Bradshaw's credibility would necessariiy have weakened appellant's defense.

Appellant also claims that he was denied effective assistance of counsel because his attorney failed to request that Steinett was an accomplice witness as a matter of law or that Steinett's status as an accomplice witness be submitted to the jury as a question of fact. Appellant asserts that Steinett was an accomplice witness because he brought about the criminal conduct. The State claims that appellant's trial counsel did not commit error because there is no evidence to support that Steinett was an accomplice witness. We

hold that the State is correct for the reasons set forth under appellant's point of error two.

Appellant next claims that he was denied effective assistance of counsel because his attorney failed to object to evidence obtained by an informant in violation of his right to counsel. Appellant claims that his right to counsel was denied because it attached when formal criminal proceedings were initiated against him, *see Forte v. State*, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986), in his narcotics trial. He asserts, therefore, that his Sixth Amendment rights were violated by Steinett's conversation with him concerning the pending charges. The evidence shows that Steinett spoke with appellant regarding appellant's narcotics trial, but Steinett's conversation with appellant occurred prior to Steinett's becoming an information for the police. At the time he contacted appellant, Steinett could not be considered an agent for the State. *Cf. Maine v. Moulton*, 106 S.Ct. 477, 487-488 (1985). Therefore, Steinett's conversation with appellant concerning appellant's narcotics prosecution did not violate appellant's Sixth Amendment rights. Also, since formal adversary proceedings had not yet begun with respect to the solicitation for murder charge, *see Maine v. Moulton*, 106 S.Ct. at 490, n. 16, appellant's Sixth Amendment rights to counsel on that charge had

not yet attached.

Appellant has failed to show that he was denied effective assistance of counsel, and his points of error three through seven are therefore overruled.

Appellant claims in his eighth point of error that the trial court erred in failing to instruct the jury that Steinett was an accomplice witness as a matter of law. Appellant contends that Steinett is an accomplice witness because he originated the crime, and argues that as an accomplice witness, Steinett's testimony requires corroboration. *See Warren*, 514 S.W.2d at 463. Appellant urges that the trial court's error in this regard requires this Court to reverse because the evidence is insufficient to corroborate Bradshaw and Steinett's testimony. We conclude that the trial court did not commit error in declining to instruct the jury that Steinett was an accomplice witness as a matter of law because the evidence simply did not support that instruction, as discussed under appellant's second point of error. Appellant's eighth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Ben G. Levy

BEN G. LEVY

Justice

Justices Duggan and Hoyt also sitting.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered 4 June 1987.

APPENDIX H1

Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistant of Counsel for his defense.

APPENDIX H2

Amendment 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.